89-357

No._____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

MARLA ROSS,
Petitioner,

v.

MIDWEST COMMUNICATIONS, INC.,
D/B/A WCCO TELEVISION,
GULF TELEVISION CORPORATION,
ANDY GREENSPAN AND AL AUSTIN,
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the negligent disclosure of a rape victim's identity and the specific details of her rape, facts which standing alone are not newsworthy, is nonetheless protected by the first amendment because they bear a reasonably intriguing relationship to a matter of legitimate public concern.

2. Whether a federal court may decide that the identity of a rape victim and the details of her rape are newsworthy as a matter of law where the State has determined that such information is confidential.

3. Whether a federal court may decide that the identity of a rape victim and the details of her rape are newsworthy as a matter of law where there is competent summary judgment evidence from which reasonable men and women might reach a different conclusion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES - STATE

STATUTES

RULES

ATTORNEY GENERAL'S OPINIONS

PERIODICALS

TREATISES

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 870 F.2d 271. The opinion of the United States District Court for the Southern District of Texas is not reported. The opinion is contained in the record below and is included in the Appendix.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its order affirming the District Court judgment on March 31, 1989. It denied Marla Ross' Petition for Rehearing by Order dated April 27, 1989. This Petition for Writ of Certiorari is filed within ninety days of the date of the order denying rehearing.

Ross requests that the Court review the decision of the Fifth Circuit. Jurisdiction is properly invoked under 28 U.S.C. Section 1254 (1) (1988).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

This Petition for Writ of Certiorari raises questions under the first amendment to the United States Constitution and made applicable to the State of Texas by the fourteenth amendment. The first amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. I.

Section 1 of the fourteenth amendment provides, in relevant part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend XIV, §1.

The petition is based in part upon Art. 57.02 et seq. of the

Texas Code of Criminal Procedure which provides:

(b) A victim may choose a pseudonym to be used instead of the victim's name to designate the victim in all public files and records concerning the offense, including police summary reports, press releases and records of judicial proceedings. A victim who elects to use a pseudonym as provided by this article must complete a pseudonym form developed under this article and return the form to the law enforcement agency investigating the offense.

(c) A victim who completes and returns a pseudonym form to the law enforcement agency investigating the offense may not be required to disclose the victim's name, address, and telephone number in connection with the investigation or prosecution of the offense.

(d) A completed and returned pseudonym form is confidential and may not be disclosed to any person other than a defendant in the case or the defendant's attorney, except on an order of a court of competent jurisdiction. The court finding required by Subsection (g) of this article is not required to disclose the confidential pseudonym form to the defendant in the case or to the defendant's attorney.

(e) If a victim completes and returns a pseudonym form to a law enforcement agency under this article, the law enforcement agency receiving the form shall:

(1) remove the victim's name and substitute

the pseudonym for the name on all reports, files, and records in the agency's possession;

(2) notify the attorney for the state of the pseudonym and that the victim has elected to be designated by the pseudonym; and

(3) maintain the form in a manner that protects the confidentiality of the information contained on the form.

(f) An attorney for the state who receives notice that a victim has elected to be designated by a pseudonym shall ensure that the victim is designated by the pseudonym in all legal proceedings concerning the offense.

(g) A court of competent jurisdiction may order the disclosure of a victim's name, address, and telephone number only if the court finds that the information is essential in the trial of the defendant for the offense or the identity of the victim is in issue.

Art. 57.03 provides:

(a) A public servant with access to the name, address, or telephone number of a victim who has chosen to be designated by a pseudonym commits an offense if the public servant intentionally or knowingly discloses the name, address, or telephone number of the victim to any person who is not assisting in the investigation or prosecution of the offense or to any person other than the defendant, the defendant's

attorney, or the person specified in the order of a court of competent jurisdiction.

(b) An offense under this article is a Class C misdemeanor.

The question presented also involves the application of Rule 56, Federal Rules of Civil Procedure, which provides in relevant part as follows:

(b) A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) The motions shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56, Fed. R. Civ. P. (1988).

STATEMENT OF THE CASE

On March 7, 1983, Marla Ross was forcibly raped by an unknown assailant. She reluctantly agreed to report the crime to the police only after she received assurances from a detective with the Harris County Sheriff's Department that the report

would be maintained in strict confidence and would be used only to apprehend the rapist. The detective assured Mrs. Ross that the report would only be made public if the rapist was apprehended and tried for the crime.

Several weeks later the police asked Mrs. Ross to attend a line-up to determine if a man in custody for another rape, that of a woman named Susan Lewis, was also her rapist. She viewed the line-up and told the detective that the man who raped her was not present in the line-up. She was never again contacted by law enforcement officials with information related to resolving her crime. There has never been an arrest. The crime remains unsolved.

One of the men in the line-up was Steven Lynn Fossum. Susan Lewis had identified Fossum as the man who had raped her. He was tried and convicted of the rape by a Harris County jury. Fossum also was convicted of raping a woman named Linda Wade. He was sentenced to ten years probation for the rape of Ms. Lewis and twelve years in prison for the rape of Ms. Wade.

Several years later Fossum's parents contacted WCCO, a Minneapolis television station, and asked its "I-Team" to investigate the convictions. WCCO dispatched several reporters to Houston to investigate the story. Their investigation, and resulting documentary, focused on two distinct issues: (1) whether Fossum was wrongly convicted of Ms. Wade's rape; and (2) whether he was wrongly convicted of Ms. Lewis' rape.

While investigating Fossum's conviction for Ms. Lewis' rape, WCCO obtained a copy of a police report of the line-up in which Ms. Lewis identified Fossum as her rapist. The report noted that "Detective Woolery's complainant" did not identify Fossum as her rapist. This statement, though it referred to Mrs. Ross, did not identify her or disclose the fact of her rape. WCCO had obtained the line-up report from a confidential source which its refused to divulge during discovery.

WCCO interviewed Detective Woolery and asked him to identify the complainant referred to in the report. He refused,

telling the reporter that the information was confidential. The reporter asked for a copy of the complainant's offense report. He refused to provide a copy of a report which would identify Mrs. Ross, explaining that the information could not be made public. Instead, he provided WCCO with a copy of the first page of the offense report with Mrs. Ross' name and address excised.

Notwithstanding Detective Woolery's refusal to identify Mrs. Ross, WCCO eventually did discover her identity and learn the specific facts of her rape. It is unclear how WCCO originally obtained the information.

WCCO ultimately prepared a documentary in which it identified Mrs. Ross, showed a drawing of her likeness and disclosed the specific details of her rape. WCCO argued that the man who raped Ms. Lewis also raped Mrs. Ross. It attempted to convince its viewers that the facts of the Lewis and Ross rapes were so similar that if Fossum did not rape Mrs. Ross, he probably did not rape Ms. Lewis.

In the course of its investigation, WCCO had learned several differences between the two rapes which suggested that the rapes were not committed by the same man. These factual differences are described in detail at Section II below. WCCO ignored these differences and fabricated certain bizarre similarities in order to support its investigative theory. In the process, they disclosed to Mrs. Ross' friends, co-workers and neighbors a painfully guarded secret - that she had been brutally raped.

Mrs. Ross filed suit against WCCO to recover damages for WCCO's invasion of her privacy. By order dated February 25, 1988, the District Court granted summary judgment in favor of WCCO, holding as a matter of law that the interests to be served by disclosure of Mrs. Ross' rape outweighed her privacy interests. The Fifth Circuit affirmed, finding that even though the documentary contained inaccurate information about her rape, the subject matter was "reasonably intriguing to a concerned public" and therefore constitutionally protected as a matter of

legitimate public concern.

REASONS FOR GRANTING THE WRIT

There are two important reasons to grant the Petition for Writ of Certiorari. First, the Supreme Court must address the broad issue that faces American courts with increasing regularity; the conflict between an individual's right to privacy and the press' first amendment right to publish private information. This Court has never ruled on the appropriate balance between the zone of private facts which a citizen may reserve to herself only and the legitimate scope of the public's interest.

Prior decisions of this Court are based upon whether the private information was obtained from a public source. For example, in Cox Broadcasting v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed 2d 328 (1975), the Court ruled that a television station could disclose the identity of a rape victim where the information was obtained in the course of a public criminal trial. In Oklahoma Publishing Co. v. District Court, 430 U.S. 908, the Court ruled that a newspaper could disclose the identity of a juvenile offender which it learned from monitoring a juvenile proceeding. And in Florida Star v. B.J.F., 58 U.S.L.W. 4816 (June 21, 1989) the Court held that a newspaper could publish the name of a rape victim it obtained from a public police record. The Court has never addressed whether constitutional limitations are imposed when private facts, obtained from a private source, are disclosed. Though it is widely assumed that private facts may be disclosed in appropriate circumstances where they relate to a public controversy, the Court has never articulated a standard to distinguish between facts which the public has a constitutional right to know and private facts which Americans can reserve to themselves.

This Court has recently acknowledged that the "uncharted state of the law in this area thus contrasts markedly with the well-mapped area of defamatory falsehoods, where a long line

of decisions has produced legal standards governing the multifarious situations in which individuals aggrieved by the dissemination of damaging untruths seek redress." Florida Star v. B.J.F., 58 U.S.L.W. 4816, 4817 fn. 5 (June 21, 1989). The time is ripe for Supreme Court guidance in this area.

The second reason to grant the writ is more delicate, yet more compelling. This Court must make clear to survivors of rape that the law provides them some means of redress when their identities are wrongfully disclosed. The Court's decision last term in Florida Star v. B.J.F. shattered the fragile confidence rape survivors possessed in law enforcement promises that their identities would not be disclosed to the community. Despite the Court's attempt to limit the breadth of its ruling, the message it sent to rape survivors was devastating - the only sure way to protect your identity and to preserve your privacy is to not report the fact that you have been raped.

There is no doubt that the Court did not intend such an effect. The Court attempted to assure women that its decision was not intended to govern a case where a survivor brings an invasion of privacy action for the disclosure of facts obtained from a confidential, non-public source. Absent a decision by this Court of a generalized scope, however, rape survivors can refer only to Florida Star and the Fifth Circuit's decision below when deciding whether to report a rape to the police. They will conclude that the law affords the rape victim little protection.

ARGUMENTS AND AUTHORITIES

Marla Ross comes to this Court with a simple request - the opportunity to present her case to a jury. She has sued a television station that destroyed her physical and emotional well-being by telling her friends, co-workers and neighbors that she has been raped.

She has brought this same, simple request to two lower courts. Each time she was told that her jury request threatened important

constitutional freedoms. Each time she was told that her neighbors enjoyed a constitutional right to learn about her rape. Each time she was told that her neighbors had a legitimate interest in learning the graphic details of her brutal sexual assault. Both times she was told that a jury trial was futile -all reasonable men and women would reach the same conclusion.

Mrs. Ross is bewildered by this sophistry. The people of Houston do not demand the names of women who are raped. They are not enriched by knowledge that a strange man held a knife to a young mother's throat and forced her to submit to violent sexual acts. They do not exhibit such a callous indifference towards a private woman's dignity and solitude.

Mrs. Ross' petition rests on a simple assertion of constitutional law: the first amendment does not protect a television station that learns of a woman's rape from a confidential source and then identifies the woman to the community. A matter as private and painful as rape - which she had divulged only to her husband, her minister and the police - is entitled to protection by the State. Nothing in the first amendment, or this Court's prior decisions, allows the press, or anyone else, to strip away this cloak of privacy and lay bare to the public the facts of her rape where, as here, the details were learned from an unnamed, confidential source, the report was sensationalized and inaccurate, the report was broadcast years after the assault, and the specific lurid details were made available for public gossip.

I.
WCCO's Public Disclosure of Mrs. Ross' Rape was not Constitutioanally Protected

The Fifth Circuit ruled that WCCO enjoyed a first amendment right to disclose that Mrs. Ross had been raped and to describe the details of the rape. With respect to her identity, the court ruled that the use of Mrs. Ross' name, likeness and a picture of

her residence was constitutionally protected because the information was necessary to bolster the credibility and persuasiveness of WCCO's documentary. 870 F.2d at 274. With respect to the details of her rape, the court found that these facts, right or wrong, were sufficiently related to the theory of WCCO's broadcast and were "reasonably intriguing to a concerned public." 870 F.2d at 273. Based upon these findings, it held that WCCO's disclosure was protected by the first amendment.

A. The Disclosure of A Woman's Rape Invades Her Privacy.

Marla Ross brought suit against WCCO for common law invasion of privacy based upon the public disclosure of private facts. The State of Texas recognizes such a cause of action in order to protect its citizens from "exploitation by those who pander to commercialism and to prurient and idle curiosity." Billings v. Atkinson, 489 S.W.2d 858, 860 (Tex. 1983) quoting 62 Am. Jur.2d, Privacy § 4. The State has adopted the Restatement (Second) of Torts standard which provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability for invasion of privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Restatement (Second) of Torts, §652D (1977) adopted in Gill v. Snow, 644 S.W.2d 222 (Tex. Civ. App. - Fort Worth 1982).

There is little doubt that WCCO's broadcast publicized Mrs. Ross' private life or that its disclosure of the specific details of the rape was highly offensive to reasonable persons. "It may be said with some degree of certainty that the American family scorns disclosures of this nature." Poteet v. Roswell Daily

Record, 92 N.M. 170, 584 P.2d 1310, 1314 (1978). "There is no public interest in publishing the names, addresses and phone numbers of persons who are victims of crime." Florida Star v. B.J.F., 57 U.S.L.W. at 4824 (White, J. dissenting).

The basis for the Fifth Circuit's ruling in favor of WCCO was its conclusion that Mrs. Ross' identity and the facts of her rape were matters of legitimate public concern. The Fifth Circuit made this decision as a matter of law. In so ruling, the Fifth Circuit ignored the State of Texas' legitimate interest in protecting the privacy of its citizens - and particularly women who have been raped - and substituted its own policy judgment. Moreover, it engaged in judicial fact-finding on a matter that is properly reserved to a jury.

B. The State of Texas Has Explicitly Determined that a Rape Victim's Identity is Not a Matter of Legitimate Public Concern

The Fifth Circuit decided that Mrs. Ross' name and the facts of her ordeal were matters of legitimate public concern without even a passing reference to legislative efforts by the State of Texas to prevent the disclosure of such information. The State has enacted two statutes to protect women who are victims of rape from publicity. The first statute, the Texas Open Records Act, broadly defines the scope of information that is held to be of legitimate concern to the public. Art. 6252-17a, Tex. Civ. Stat. Ann. (Supl. 1988). The Open Records Act provides as follows:

> Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principal that government is a servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by

> law, at all times entitled to full and complete information regarding the affairs of the government on the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

Art. 6252-17a, Tex. Civ. Stat. Ann. (Supl. 1988).

Notwithstanding this broad recognition of the public's legitimate interest in the free flow of information, the State has unequivocably provided that the identity of a rape victim and the details of her assault lay well outside the area of the public's legitimate interest. The State Attorney General has opined that the identity of a rape victim and the details of her rape constitute information which is confidential under Texas law and exempt from disclosure under the Open Records Act. Open Records Decision No. 339 (1982). The Attorney General stated:

> The mere fact that a person has been the object of a rape or attempted rape does, we believe, reveal "highly intimate or embarrassing facts" about the victim and in our view, disclosure of this fact would be "highly objectionable to a person of ordinary sensibilities."

Id.

Texas' interest in protecting the identity of rape victims is expressed with even greater clarity in the Texas Code of Criminal Procedure. Article 57.01, et seq., Texas Code of Criminal Procedure safeguards the confidentiality of information relating to sex offense victims[1]. The statute allows a victim of

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[1]The statute was not enacted at the time of Mrs. Ross' assault and therefore she was unable to avail herself of it's protections.

sexual assault to choose a pseudonym to be used instead of her real name in all public files and records concerning the offense, including police summary reports and records of judicial proceedings. Once a victim chooses a pseudonym, a law enforcement agency may not disclose the victim's name or other identifying information, either during the investigation of the offense or during prosecution. The only persons who are ever entitled to learn the victim's identity are the defendant and his attorney in connection with a criminal prosecution. The statute directs the law enforcement agency to remove the victim's name and substitute the pseudonym on all files, reports or records in the agency's possession, notify the prosecutor of the election of a pseudonym, and continue to maintain the confidentiality of the victim's identity. It requires the prosecutor to "ensure that the victim is designated by pseudonym in all legal proceedings concerning the offense." Art. 57.02 Tex. Code Crim. Proc. (1986). Disclosure in violation of the statute is a criminal offense. Art. 57.03.

The statute is a testament to the State's efforts to protect the privacy of women who are victimized by sexual assault. It is compelling evidence of the State's determination that a rape victim's identity is not a matter of legitimate public concern.

The confidentiality statute would have protected Mrs. Ross' identity from disclosure in judicial records in the event that her assailant was arrested and tried for the crime. More to the point, the statute would have protected Mrs. Ross' privacy in the event Fossum's attorney had attempted to build the very defense at trial that WCCO attempted to build in its documentary. That is, Fossum's attorney could not have identified Mrs. Ross in a public criminal trial, even though his client had a far more specific and compelling interest in disclosing such information. It is inconceivable that the public's generalized interest in Mrs. Ross' identity and the facts of her rape, if any, rise above such a level and require constitutional protection.

Herein lies the principal defect in the Fifth Circuit's decision.

It presumes to legislate between competing social interests: public access to information and State protection of rape victims. The State of Texas has in fact considered the proper balance between these competing interests. It has determined that a rape victim's identity and the specific facts of her rape are not matters of legitimate public concern. The Fifth Circuit decided a different balance was more appropriate. Its decision is simple, unabashed judicial legislating, with a wink and a nod toward an undefined first amendment right to freedom of press. The decision is not based upon any articulated first amendment principle which protects press disclosures of rape victims' identities or prohibits the state from prohibiting such disclosures. Nor is the decision based upon some thoughtful review of the evidence, leading to an inescapable conclusion that all reasonable men and women would have a legitimate interest in the information, notwithstanding the general rule that such information is confidential. There is no principled basis for the decision.

II.
A Jury Should Decide Whether Mrs. Ross' Identity was of Legitimate Public Concern

WCCO claims that Mrs. Ross' identity and the specific facts of her rape were newsworthy because they were critical to its presentation that the government had wrongly convicted Mr. Fossum of Susan Lewis' rape. Of course, Fossum had no connection to Mrs. Ross' rape. He was never arrested for or charged with her rape. Rather, the link between WCCO's decision to publicize Mrs. Ross' rape and its documentary on the rape for which Fossum was convicted, was WCCO's theory that the modus operandi in both rapes were so similar that if Fossum did not rape Mrs. Ross, he probably did not rape Susan Lewis. This theory, which the Fifth Circuit explicitly accepted, is seriously flawed and subject to grave doubt.

There is, of course, the obvious logical flaw in WCCO's argument. But WCCO's theory suffers from a more serious defect - it is not supported by the facts. The circumstances of the two rapes were not so similar that one must conclude they were committed by the same man. During its investigation, WCCO established only three similarities: (1) in each instance, the rapist gained access to the victim's home under false pretense; (2) he raped both women at knife-point; and (3) he threatened to kill each woman if she reported the crime to the police. There is nothing strikingly unique about these similarities. It is likely that Mrs. Ross could prove at trial that a high percentage of sexual assaults committed nationwide bear such similarities.

During its three-month investigation, WCCO also learned several differences between the attacks. Ms. Lewis' attacker demanded that she provide him with nude photographs. Ms. Ross' attacker made no such demand. WCCO reported that the assailant made this request of both women. Ms. Lewis' assailant took only a few small items of property of little value from her home. Mrs. Ross' assailant burglarized the home, taking property valued at more than $2,000.00. WCCO reported that only "petty theft occurred in both rapes." Following the assault, Ms. Lewis' assailant placed a jar of trinkets on her back and warned her not to move or he would be alerted and would return and kill her. This crude alarm system was the most distinctive feature of the Lewis rape - it was the linchpin of WCCO's theory that the same man committed both rapes. Moreover, it provided a sensational medium for convincing the audience of its theory - a descriptive picture of a victimized woman, bound and naked, lying on the floor of her house with a jar of trinkets placed on her back to serve as a warning to her assailant that she is attempting to summon help. To reinforce this startling image, a WCCO reporter shook a jar of trinkets in front of the camera as he discussed Mrs. Ross' rape.

It was not true. There was no jar of trinkets in Mrs. Ross' assault.

WCCO learned of other differences between the rapes that it did not disclose, undoubtedly because these differences conflicted with its theory and weakened its story. Ms. Lewis' assailant wore a wedding ring. Mrs. Ross' did not. Ms. Lewis' assailant has a scar near his "upper leg". Mrs. Ross' assailant has a scar on his "stomach". Ms. Lewis lived in North Houston, Mrs. Ross in West Houston. In fact, prior to its broadcast, WCCO prepared a list of facts it needed to confirm regarding Mrs. Ross' rapist, including his accent, whether he was circumcised, the physical description of the knife sheath, results of a rape test, etc. They never verified any of these facts.

A. A Jury Should Decide Whether There Was a Logical Relationship Between Mrs. Ross' Rape and a Matter of Legitimate Public Concern

The legitimacy of WCCO's disclosure depends on the legitimacy of its theory connecting the Ross and Lewis rapes. Absent a legitimate relationship, there is no reason to protect the disclosure. The law requires a logical relationship between the disclosure of private facts and a related matter of public concern. Gilbert v. Medical Economics, 665 F.2d 305 (10th Cir. 1981); Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980).

The legitimacy of WCCO's theory of relevance was a disputed question between the parties. Mrs. Ross' rape had no connection to that of Ms. Lewis. Mrs. Ross contends that WCCO knew of the defects of its theory. She contends that her identity and her rape have no logical relationship to the Lewis rape and that her private life should not have been destroyed in support of such a flimsy theory. She raised these arguments in defense of WCCO's motion for summary judgment.

WCCO was entitled to summary judgment only if there was no genuine issue regarding any material fact concerning its defense that the matter was newsworthy. Rule 56, Fed. R. Civ. P. Mrs. Ross, as the non-moving party, was entitled to all

favorable inferences to be drawn from the summary judgment evidence. Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969) cert. denied 396 U.S. 922, 89 S. Ct. 1776, 23 L. Ed. 2d 239 (1969). If, after reviewing the summary judgment evidence and drawing all inferences in favor of Mrs. Ross, reasonable men and women might reach different conclusions about whether her rape was a matter of legitimate public concern, the issue should have been reserved for trial and summary judgment should not have been granted. Harvey v. Great Atlantic & Pac. Tea Co., 388 F.2d 123, 125 (5th Cir. 1968) The same standard is applicable at the appellate level. The record must affirmatively foreclose the possibility that a jury might view the facts differently at trial. Beech v. United States, 345 F.2d 872, 874 (5th Cir. 1965).

A jury could easily conclude that there is no logical relationship between Mrs. Ross' rape, Ms. Lewis' rape and, ultimately, Mr. Fossum's convictions. The summary judgment evidence created fact issues concerning whether the rapes were somehow connected. Moreover, summary judgment evidence clearly raises a question of whether Mrs. Ross' identity was matter of legitimate public concern. The Fifth Circuit resolved both fact questions. It found that her identity was of legitimate public concern because "communicating that this particular victim was a real person with roots in the community, and sharing WCCO's knowledge of the details of the attack upon her, were of unique importance to the credibility and persuasive force of the story." 870 F.2d at 274. It found that the specific facts of the rape were "arguably relevant" and "reasonably intriguing to a concerned public." 870 F.2d at 273. A jury of reasonable men and women certainly might reach a different conclusion. The Fifth Circuit should not have substituted its judgment for that of a jury.

B. A Jury Should Decide Whether Private Facts are of Legitimate Public Concern

The cause of action recognized by the State of Texas for invasion of privacy presumes that a jury will decide whether private facts are a matter of legitimate public concern. The Restatement of Torts explicitly provides that a determination of newsworthiness requires reference to the specific facts disclosed within the context of the "customs and conventions of the community" and "community morals." Restatement (2d) of Torts, § 652D, Comment h. See also Woito & McNulty, The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness? 64 Iowa L. Rev. 185 (1979). Clearly, a court may determine that a matter is newsworthy without submitting the question to a jury if reasonable minds within the community could reach only one conclusion. But where reasonable minds might differ, the issue is reserved to a jury.

The Ninth Circuit's decision in Capra v. Thoroughbred Racing Association, 787 F.2d 463 (9th Cir. 1986) is instructive. In that case the plaintiffs sued a horse racing magazine for invasion of privacy after it disclosed their true identities, which had been concealed by the federal witness protection program. The Plaintiff had been convicted of fixing horse races. In exchange for his testimony against others, he and his family members were allowed to participate in the witness protection program. Under their new identities, his wife and son sought an open claiming license from the California Racing Board. The Thoroughbred Racing Association investigated his application, determined plaintiffs' true identities, and disclosed them as part of their opposition to Plaintiffs' application. Plaintiffs sued to recover damages they incurred as a result of the disclosure. The district court granted the Racing Association's motion for summary judgment, finding that the information disclosed, although private, was newsworthy. The Ninth Circuit reversed, holding that the issue of newsworthiness should have been submitted to a jury. The court stated that a jury must weigh three

factors in considering the newsworthiness of a disclosure: (1) the social value of the facts published; (2) the depth of the publication's intrusion into ostensibly private affairs; and (3) the extent to which the party voluntarily assumed a position of public notoriety. 787 F.2d at 464. The court concluded that "a reasonable jury, applying the three part standard, could find that the press release was not newsworthy as to one or more of the plaintiffs." 787 F.2d at 464-465.

Allowing a jury to decide the issue does not "chill free speech" or otherwise offend the first amendment. Virgil v. Time, Inc., 527 F.2d 1122, 1130 (9th Cir. 1975); Woito & McNulty, above at 223-229. There is no principled reason to limit such a determination to the court. Ibid; See also Diaz v. Oakland Tribune, Inc., 139 Cal. App.3d 118, 133 Cal. Rptr. 762, 772 (1983) ("Where reasonable minds could differ, we see no constitutional infirmity in allowing the jury to decide the issue of newsworthiness.")

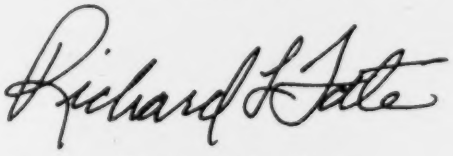
This Court has allowed juries to decide whether contested speech is obscene, Miller v. California, 412 U.S. 15, 93 S. Ct. 2607, 37 L. Ed.2d 419 (1973); defamatory, Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed.2d 495 (1973); fraudulent, Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748, 771 96 S. Ct. 1817, 48 L. Ed.2d 346, 364 (1976); conspiratorial, California Transport v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed.2d 692 (1972); and, inciting, Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 103, (1941). In the same manner, the Court should allow a jury to determine whether the facts of Mrs. Ross' sexual assault are of legitimate public concern.

CONCLUSION

With its opinion in this case, the Fifth Circuit has destroyed the State of Texas' efforts to protect the privacy of women who are raped. It has elevated an amorphous concept of 'public intrigue' above the State's compelling interest in protecting a victimized woman's privacy. It has decided that efforts to increase the credibility of a television broadcast justify a disturbing intrusion into a woman's private life. In short, it has decided that a woman's privacy is not worth protecting in American society. It is incumbent upon this Supreme Court to correct the Fifth Circuit's grave error. Mrs. Ross makes this request not only on her own behalf, but also on behalf of the thousands of women who are now forced with an agonizing dilemma - to report rape and seek justice or to remain silent and protect privacy. Our constitution does not mandate such a choice.

DATED AND SERVED this 26th day of ~~July~~ August, 1989.

Respectfully submitted,



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RULE 28 CERTIFICATE

I hereby certify that a true and correct copy of this Petition for Writ of Certiorari was delivered to counsel of record listed below by certified mail, return receipt requested on this 26th day of ~~July~~ August, 1989.

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2105

MARLA ROSS,
Plaintiff-Appellant,

v.

MIDWEST COMMUNICATIONS, INC.,
D/B/A WCCO TELEVISION,
ANDY GREENSPAN AND AL AUSTIN,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
(CA-H-86-4295)

(March 31, 1989)

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

HIGGINBOTHAM, Circuit Judge :

A television station broadcast a documentary questioning the guilt of a man convicted of rape. To make its case, the documentary spelled out the details of several rapes. One rape victim sued the maker of the documentary, claiming an invasion of privacy. Her actual first name and a picture of her residence

had been used in the documentary. The district court granted summary judgment for the journalists on both state law and constitutional grounds. The rape victim appeals. We affirm, holding that no liability can attach under Texas law because the details reported were newsworthy as a matter of law.

I.

Marla Ross, the plaintiff-appellant in this case, was raped in 1983. She reported the rape to police, but the rape remains unsolved. During the investigation of the rape, Steven Fossum was a suspect. The police asked Ross to view a line-up that included Fossum. Ross said that the man who raped her was not among those in the line-up.

Fossum was however convicted of two other rapes. In 1986, WCCO-TV (Midwest Communications, Inc.), and its reporters Al Austin and Andy Greenspan, prepared a documentary designed to prove Fossum' s innocence. WCCO, Austin, and Greenspan are the defendant-appellees in this case. In addition to presenting other evidence, WCCO' s documentary sought to show that the details of the first rape for which Fossum had been convicted were nearly identical to the details of the Ross rape. WCCO suggested that the two rapes were probably committed by the same person, and that Ross's failure to identify Fossum as the rapist in her case indicated that he was innocent of both rapes. In order to demonstrate the similarity of the two rapes, WCCO described the pretext used by the rapist to gain entrance to the victim's home (the rapist claimed to work for Genex Homes, to have lost an Irish Setter, and to desire to make a phone call), the sexual demands of the rapist during the assault, and the rapist's fixation with baths and showers. WCCO also mentioned some details which Ross claims were inaccurate with respect to her rape, including the rapist's use of a jar of coins or trinkets, balanced on the bound victim's body, as an alarm to aid his escape. WCCO referred to Ross as "Marla," her actual first name, during the documentary. WCCO used in the documentary

an actual photograph of the house in which Ross lived at the time of the rape.

The documentary aired in Houston in May of 1986. The Governor of Texas pardoned Fossum for the second of the two rapes. That was not the rape to which the Ross case was relevant. A motion for new trial on the first rape conviction, the Susan Lewis rape, was pending at the time this case was briefed. The documentary received the Dupont Columbia Award, which WCCO claims is "the most prestigious award in broadcast journalism."

In September 1986, Ross and her husband sued WCCO, Greenspan, Austin, and Belo Broadcasting in Texas State Court for invasion of privacy. Defendants WCCO, Greenspan, and Austin were Minnesota residents, and removed on the basis of diversity. Ross later dropped her suit against Belo Broadcasting, the only local defendant. WCCO, Austin, and Greenspan sought summary judgment.

The district court granted summary judgment for defendants on both state law and Constitutional grounds. The court reasoned that because Fossum' s interest and the public' s interest in reversing false convictions outweighed Ross's privacy interest, the journalists had no liability.

II.

On appeal, neither party urges us to endorse the open-ended balancing of interests performed by the district court and we do not. We are not bound to accept the district court' s rationale for its decision, and are free to affirm the district court's decision on alternative grounds, if those grounds have been properly preserved.

WCCO suggests two grounds for affirmance. Both grounds were submitted to the district court. First, WCCO contends that the details of the Ross rape bore a logical nexus to matters of legitimate public concern, so that both Texas state tort law and federal constitutional law prohibit the imposition of liability for

the publication of those details. See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W. 2d 668, 682 (Texas 1976) (no state law liability for invasion of privacy if the details published were "of legitimate public concern"); Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980) (identifying, by reference to common law rules, a First Amendment Privilege "to publish or broadcast news or other matters of public interest").

Second, WCCO contends that the details published come within the scope of the bright-line rule articulated in Cox Broadcasting Corp. v. Cohn, publication of matters of public record). Alternatively, WCCO, relying upon Cox Broadcasting and later cases including Smith v. Daily Mail Publishing, 443 U.S. 97, 102-03 (1979), asks us to recognize a broader bright-line rule, one which would preclude the states from imposing liability for any publication of truthful information lawfully obtained.

Under the familiar maxims set out by Justice Brandeis in Ashwander v. Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), this court will not pass upon a constitutional question if a statutory ground is available, and will not formulate a broader constitutional rule than the facts of a particular case require. Both lines of reasoning proposed by WCCO are of constitutional dimension. In the "newsworthiness" line of argument, however, the state law and constitutional tests are the same. The First Amendment restrictions we identify in that line of inquiry are no different from those imposed on the privacy tort by the terms of Texas state law itself. By contrast, the bright-line rules contended for by WCCO either establish independent limitations upon the state's ability to define the scope of the "newsworthiness" defense, or go beyond that defense to establish protection for some arguably non-newsworthy publications. In order to avoid announcing constitutional restrictions unnecessarily, and so in adherence to the counsels of Ashwander, we begin our analysis with the "newsworthiness" line of argument.

Under Texas law, an action for invasion of privacy will lie for four sorts of injuries:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 682 (Texas 1976), quoting W. Prosser, Privacy, 48 Cal.L.Rev. 383, 389 (1960). The first of these injuries exists only when there has been "a physical invasion of a person's property or... eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying." Gill v. Snow, 644 S.W.2d 222, 224 (Tex.App.—Fort Worth 1982). Ross's suit must therefore be considered under the rubric of the second form of injury, public disclosure of embarrassing facts.

Ross, "in order to recover for public disclosure of private facts about [herself], must show (1) that publicity was given to matters concerning h[er] private life, (2) the publication of which would be highly offensive to a reasonable person of ordinary sensibilities, and (3) that the matter publicized is not of legitimate public concern." Industrial Foundation, 540 S.W.2d at 682, citing W. Prosser, Law of Torts § 117, p. 809 (4th ed. 1971).

To apply this test, we must first ascertain what "private facts" Ross is alleging WCCO to have disclosed. There are at least three possibilities: (A) the details of the rape itself; (B) the allegedly false details included in the report; and (C) Ross's first name and the appearance of her former residence.

Ross has contended vigorously that the details of the rape were themselves "private facts." Yet these facts were clearly of

"legitimate public concern." The Ross brief itself effectively concedes as much. With respect to WCCO's suggestion that Fossum is innocent of the Lewis rape because innocent of the Ross rape, the brief says, "WCCO's theory was intriguing and, if verifiable, undoubtedly worthy of public disclosure in one form or another." The brief adds the proviso that "the facts of Mrs. Ross's rape did not fit the theory," but this proviso amounts at most to an argument that WCCO's theory was wrong. That argument does not generate a material issue of fact as to whether the theory addressed a matter of legitimate public concern. The details of the Ross rape are relevant to Fossum's innocence, a legitimate matter of public concern, so long as the Ross and Lewis rapes are sufficiently similar to generate a reasonable argument that the rapes were committed by the same individual. The argument need not be convincing to all, or even most, of its auditors. It need only be, as Ross's brief nicely puts it, reasonably "intriguing" to a concerned public.

There is no doubt that WCCO's report on the Ross and Lewis rapes meets this standard. The excuses used by each rapist to enter the victims' homes were strikingly similar: both attackers claimed to be employed by Genex homes, and to have lost a dog. Even absent the details contested by Ross, the demands made by the two rapists were, again, strikingly similar. So were the descriptions provided by the victims. We have no difficulty finding that, under Texas law, WCCO's report of these details does not give rise to a cause of action for invasion of privacy, for the details are evidently of "legitimate public concern."

The second possibility, that the "private facts" are the allegedly false details of the Ross rape, is inconsistent with Ross's apparent theory of liability. She did not file a libel claim. Indeed, the problem with such a cause of action, from Ross's perspective, would be that the damages she seeks stem from the disclosure of the uncontested, rather than the disputed, details of her rape. Nor would the inclusion of some inaccuracies in WCCO's documentary detract from the newsworthiness of the facts

correctly reported. We do not understand Ross to rely on these allegedly false details as a ground for her suit. Rather, we understand her to suggest that WCCO's inclusion of some false claims is evidence that the true material was not newsworthy.

The third possibility, that the "private fact" is Ross's identity as the rape victim, is the basis for Ross's strongest argument. She contends that even if the details of her rape were newsworthy, the documentary could have been produced without mentioning her name, and thus without disclosing the indignities of her rape to the world. This argument, however, is difficult to accommodate within the literal terms of the privacy tort definition, quoted above. Ross's name, residence, or "identity" are not easily characterized as "private, embarrassing facts. " The more common form of privacy tort involves the disclosure of facts which are interesting precisely because the facts are about a known, specified individual. See, e.g., Gill v. Snow, 644 S.W.2d 222; Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980). The public concern over these facts is inseparable from the public concern over the connection between the facts and the individual involved.

To bring this case within the ambit of the Industrial South test, we must characterize the essential question as whether Ross's connection to the rape details—themselves a subject of public concern—was itself also a matter of public concern. This issue is apparently one of first impression in Texas. We have not found any Texas cases contesting the newsworthiness of an individual's personal connection to the details of an event which are concededly newsworthy in themselves.

The Tenth Circuit did, however, consider this question in Gilbert v. Medical Economics Co., 665 F.2d 305, 308 (10th Cir. 1981). Gilbert involved a periodical article describing an alleged breakdown in the evaluation of a doctor's fitness, and a consequent malpractice problem. The plaintiff, Gilbert, was the subject of the story. Her name was used, and details of her personal life were revealed. The trial court granted summary

judgment for the defendant on constitutional grounds. The Tenth Circuit affirmed. The court cited with approval our decision in Campbell, and construed the scope of the First Amendment protection against liability for publication by reference to the elements of the privacy tort: the constitution barred liability for the dissemination of true, private information if no liability would exist under the common law tort. The Court of Appeals concluded that Gilbert's connection to the malpractice incident was a matter of legitimate public concern. The court stated that "plaintiff's photograph and name" were "substantially relevant to a newsworthy topic because they strengthen the impact and credibility of the article. They obviate any impression that the problems raised in the article are remote or hypothetical, thus providing an aura of immediacy and even urgency that might not exist had plaintiff's name and photograph been suppressed." 665 F.2d at 308.

WCCO and its reporters make a similar argument for its use of Ross's first name, and for its photograph of her former residence. The journalists argue that the use of Ross's name, and the picture of her residence, provides a "personalized frame of reference that fosters perception and understanding, " and avoids the loss of credibility that comes with anonymity.

This argument has force. The infamous Janet Cooke controversy (about the fabricated, Pulitzer-Prize winning Washington Post series on the child-addict, Jimmy) suggests the legitimate ground for doubts that may arise about the accuracy of a documentary that uses only pseudonyms. On the other hand, WCCO did use some pseudonyms in its documentary, and WCCO could have demonstrated the accuracy of its report by using the police department's offense number for each incident. Numbers, however, are easily forgotten, and would most likely have less impact.

The argument establishing a logical nexus between the rape victim's name and a matter of legitimate public concern is peculiarly strong in this case because the point of the publication

was to persuade the public, and in turn authorities, to a particular view of particular incidents. Communicating that this particular victim was a real person with roots in the community, and showing WCCO's knowledge of the details of the attack upon her, were of unique importance to the credibility and persuasive force of the story. We thus may, and now do, decide that Ross's connection to the details of the rape in this case was a matter of legitimate public interest, without also deciding that the name of a rape victim is always matter of public concern if her rape is a matter of public concern.

We reach this conclusion aware that judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively. Reporters must have some freedom to respond to journalistic exigencies without fear that even a slight, and understandable, mistake will subject them to liability. Exuberant judicial blue-pencilling after-the-fact would blunt the quills of even the most honorable journalists. Yet we need not now decide the extent of judicial deference to editorial discretion. Here, it is at least arguable, even with the benefit of hindsight, that WCCO was correct in its judgment about the newsworthiness of the victim's identity. That conclusion, although it no way diminishes the victim's legitimate distress, justifies the district court's grant of summary judgment to defendants.

III.

Our holding today is narrow. Our decision turns upon the peculiar facts present in this case. We point out that the doctrine we announce today, although it justifies the district court's award of summary judgment against Ross, does not leave rape victims without any protection against public disclosure of their names. First, the discussion above leaves open the possibility that the rape victim's name may be irrelevant when the details of the rape victim's experience are not so uniquely crucial to the story as they are in this case, or when the publisher's "public concern" goes to a general, sociological issue. Second, the

discussion leaves open the state's power to protect rape victims' privacy by preserving the confidentiality of the state' s records, and punishing any who steal the information. Liability for the wrongful taking of information could encompass damages resulting from the foreseeable publication of the information. Consider Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 836-37 (1978) (suggesting that Virginia might preserve the confidentiality of judicial disciplinary proceedings by punishing those who disclose the information, rather than third parties who publish the information).

Moreover, we find it unnecessary to reach any of the other issues briefed by the parties. We need not, for example, determine whether WCCO enjoyed immunity from liability because of constitutional protection for the publication of matters contained in public records, or more generally for the publication of truthful materials lawfully obtained. See, e.g., Smith v. Daily Mail Publishing, 443 U.S. 97, 102-03 (1979) ("our recent decisions... all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order"); see also, Cox Broadcasting Corp. V. Cohn, 420 U. S. 469 (no liability for publication of matters of public record); Landmark Communications, Inc., 435 U.S. 829 (no liability for publication of lawfully-obtained confidential information about a public official); Worrell Newspapers of Indiana, Inc. v. Westhafer, 739 F.2d 1219, 1225 (7th Cir. 1984), aff'd, 105 S.Ct. 1155 (1985) ("when the press, by whatever means, obtains the information contained in a court-sealed document, a state cannot prohibit the publication of the information without violating the First Amendment"); WXYZ, Inc. v. Hand, 658 F.2d 420, 427 (6th Cir. 1981) (statute is unconstitutional insofar as it purports to determine conclusively and in every case that privacy interests of rape victim outweigh public need to know victim's identity). Nor does this case

require us to decide how much "breathing room" is available to protect an editor, who publishes information that was potentially but not actually newsworthy, from retrospective judicial blue-pencilling.

Our constitutional warrant authorizes us to decide only those "cases and controversies" actually before us. Nowhere is the wisdom of that restriction more apparent than in cases like the present one, which poses a conflict between two fundamental aspects of individual liberty: a citizen's right to be free from public inquiry into private matters, and a journalist's right to report upon matters of legitimate public concern. The broad issues suggested but not raised by Ross's claim are therefore deferred until we must in fact decide them.

The judgment of the district court is AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2105

MARLA ROSS,
Plaintiff-Appellant,
v.
MIDWEST COMMUNICATIONS, INC.,
D/B/A WCCO TELEVISION,
ANDY GREENSPAN AND AL AUSTIN,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING
(April 27, 1989)

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Filed:
April 27, 1989

/s/ Patrick Higginbotham
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARLA AND DAVID ROSS	§	CIVIL
V	§	ACTION
MIDWEST COMMUNICATIONS, INC.,	§	NO.
D/B/A WCCO TELEVISION CORPORATION,	§	H-86-4295
ANDY GREENSPAN AND AL AUSTIN	§	

ORDER

The above-captioned cause of action is one by which Plaintiffs MARLA ROSS and DAVID ROSS ("ROSS") seek to recover civil damages allegedly suffered as the result of public disclosure by Defendants of certain facts. ROSS claims that the disclosure constitutes an actionable invasion of her right to privacy.

Before the Court is Defendants' MIDWEST COMMUNICATIONS, INC., d/b/a WCCO TELEVISION ("WCCO"), ANDY GREENSPAN ("GREENSPAN") and AL AUSTIN ("AUSTIN") (or collectively "WCCO") motion for summary judgment. Defendant GULF TELEVISION CORPORATION ("GTC") has answered, but is not a named movant in the summary judgment motion. There is no issue pertaining to GTC which exists beyond the scope of WCCO's instant motion.

ROSS claims that her constitutional right of privacy was infringed by investigations leading to and broadcast of documentary telecast entitled "The State of Texas v. Steven Lynn Fossum." In that program, aired May 24, 1986, certain facts were revealed having to do with a sexual assault upon [Mrs.] ROSS which occurred in March of 1983. The disclosed facts include [Mrs.] ROSS' first name, her address at the time of the assault (Where the attack occurred), use of a caricature said to resemble [Mrs.] ROSS, and certain details of the attack.

The summary judgment argument focuses primarily on the

issue of whether the information obtained was "public" information gleaned from public records. Texas law has characterized the front page of a law enforcement offense report as a public record. However, that characterization has been limited in certain circumstances. A reported incident of serious sexual assault like that suffered by ROSS can fall within the limitation. The Texas Attorney General has opined that identification information in such a case may not be subject to the public record characterization. Notwithstanding the denomination of the offense report as public or non-public, no overt allegation has been made that WCCO engaged in any untoward conduct to obtain the information it disclosed in the documentary. Whether the Harris County authorities violated the State of Texas' open records policy is not an issue in this case. Rather, ROSS would impose an affirmative duty on WCCO (and GTC) not to disclose facts, later deemed "private", regardless how the information was obtained. Thus, the State of Texas' labeling of these facts is not a material issue in this case.

It is the Court's view that the true issue to be decided is whether the Defendants unduly infringed on some privacy interest of ROSS. There is no doubt that broadcast of the name and address of a rape victim along with detailed information about the attack for the sake of sensationalism or mere curiosity could give rise to an action for damages. Here more was at stake. Whatever privacy interests ROSS may have as to the reported incident must be weighed against the interests to be served by disclosure of the information. In this case the competing interests weigh heavily.

The impetus for the documentary was the assertion by his family that Steven Lynn Fossum had been wrongly accused, convicted and incarcerated in Texas for sexual assault. As a result of the documentary and subsequent investigations Fossum was pardoned and released.

The television film made by WCCO and broadcast locally by GTC focused on a series of rapes, several of which had in

common a unique modus operandi. The facts underlying the first Fossum conviction and ROSS' police report shared many notable and unusual similarities. Likewise, a third reported sexual assault was virtually identical. It is these similarities which constitute the details of ROSS' sexual assault allegedly wrongfully publicized. Each of the three complainants was similarly treated by Defendants: identified by first name only; location of the attack disclosed; a caricature displayed; and, the common elements of the offense detailed. Two of three complainants, and one other witness, had affirmatively said Fossum was not the rapist. In the context of the documentary, as well as the context of Fossum's tribulations, the Court has found no actionable wrong suffered by ROSS.

When weighed against the interests of Steven Lynn Fossum, and, more importantly, the interests of our society as a whole not to incarcerate innocent individuals, whatever privacy interests ROSS may have in the information generated as a result of her having filed a criminal complaint must pale. Moreover, to bring to the public attention the fact that an individual to whom a series of rapes has been attributed, whether by conviction or by investigative disposition, is indeed innocent, would serve both the legitimate interests of the public and the interests of ROSS in moving forward with an investigation which had erroneously been foreclosed. Surely ROSS would benefit from the apprehension of the true rapist. Surely she would benefit from the knowledge than an innocent man was free, and that a fictional impediment to the resolution of her complaint had been removed.

The legitimate public interest in the fair administration of the criminal justice system together with the overwhelming public interest in assuring the basic freedom from unlawful confinement far outweigh the articulated concerns of ROSS in this case. The acts of WCCO and GTC did not unduly infringe on legitimate privacy interests of ROSS. There is no disputed fact material to he resolution of this controversy and Defendants

are entitled to judgment as a matter of law. It is, therefore, ORDERED that Defendants' WCCO, GREENSPAN and AUSTIN motion for summary judgment is GRANTED.
DONE at Houston, Texas, this 25th day of February, 1988.

/s/
JOHN V. SINGLETON, JR., CHIEF
UNITED STATES DISTRICT JUDGE